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Take Three: In Loco Parentis Revisited for Third Time in a Year

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Special to the Legal

In what is becoming one of the hottest topics in Pennsylvania child custody law, in loco parentis took center stage before the Superior Court in the recent case of *M.J.S. v. B.B. v. B.B.*, ___ A.3d ___, 2017 Pa. Super 327 (Oct. 17). This case is one of three cases to address in loco parentis status by a litigant in a child custody case recently. The recent case of *K.W. v. S.L. and M.L. v. G.G.* addressed in loco parentis status and parties with whom a child was placed for adoption. A week prior to the present case being decided, the Superior Court also addressed in loco parentis status in the case of *C.G. v. J.H.*, which pertained to a same sex couple. Both cases were reported on by this author in April 2017 and December 2017, respectively.

The case of *M.J.S.* pertains to a grandmother who intervened in a child custody case, was found to have in loco parentis status, and granted primary physical custody of the child in question. The facts of the *M.J.S.* case, according to the opinion, in part, are as follows: L.M.S. was born in 2010 to B.M.B. (the mother) and M.J.S. (the father). During the first five years of L.M.S.'s life, "he lived with the mother at grandmother's home." The father, who lives approximately one



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hour away from the grandmother, exercised partial physical custody of the child on alternating weekends pursuant to an informal custody arrangement.

Approximately five years after the child was born, the mother informed the father that she intended to enroll in an inpatient detoxification program and asked that the father assume custody of the child. The father then took physical custody of the child and filed a petition for primary physical custody approximately one week later. Thereafter, the father enrolled the child in kindergarten in the school district where he lived and filed an emergency petition "alleging that the mother continued to abuse illicit drugs." The father was granted temporary primary physical

custody of the child and a hearing was scheduled for a future date. The grandmother then filed an emergency petition to intervene and requested primary physical custody of the child.

In filing her petition, the grandmother "asserted that she 'has always been the primary caretaker ... [and] has provided for all of the financial, emotional and physical needs of the child.'" As stated in the opinion: "essentially, the grandmother asserted that she stood in loco parentis since the child's birth." The trial court immediately granted the grandmother's petition to intervene and awarded the grandmother emergency primary custody of the child pending hearings "on the parties' dueling petitions for emergency relief." Thereafter, the trial court held a custody trial on the father's petition for primary custody. As stated in the Superior Court's opinion, it took the trial court approximately nine months to enter a final order and opinion after the trial and awarded all three parties (mother, father and grandmother) shared legal custody and granted the grandmother primary physical custody, while providing the father periods of partial physical custody. It is to be noted that the mother's custodial periods were undesignated and to be exercised during the grandmother's primary physical custodial periods. The Superior Court made a point of disapproving the

nine-month delay that the trial court took in issuing its order.

The father filed a timely appeal and raised numerous issues. The focus of this article pertains to the father's claim that the trial court erred in finding that the grandmother had standing to bring her action and whether the trial court erred in finding that the father had a burden to sustain where the Custody Act clearly states that there is a presumption that custody should be with a parent over a third party.

With regard to in loco parentis status, the Superior Court cited the *K.W.* case, referenced earlier in this article, and highlighted primarily three components to in loco parentis standing: the assumption of parental status; the discharge of parental duties; and that in loco parentis began with the consent of the parent. The father focused on the fact that the grandmother shared parental duties with the mother when the child lived with the grandmother and the mother. The Superior Court distinguished this case from one where the grandmother was essentially a "glorified baby-sitter." One may recall the case of *D.G. v. D.B.*, 91 A.3d 706 (Pa. Super. 2014), where the Superior Court reversed the trial court's finding that the grandmother stood in loco parentis to the child when the child's mother and grandmother resided in the same residence. According to the opinion, the Superior Court states: "In sum, Pennsylvania jurisprudence simply does not support the contention that the grandmother was required to assume the role of L.M.S.'s sole parental figure in order to attain in loco parentis status." Further, the Superior Court stated that the "grandmother, mother and L.M.S. lived together five years as an intact family unit and grandmother either shared or assumed sole parenting responsibility for the entirety of the child's life" and the mother fed, bathed and entertained the child daily, attended doctors' appointments and transported him to kindergarten

class. The grandmother also assisted the child financially.

In addressing the consent component of in loco parentis in this case, the court indicates that the father impliedly consented to the development of the in loco parentis relationship between the grandmother and the child. The Superior Court highlights that the father failed to oppose the grandmother's assumption of parental duties and that he allowed her to share in the parental responsibilities with the mother. As the father in the *K.W.* case could not provide implied consent to in loco parentis as held by the Superior

This case reiterates that there is a strong presumption in favor of a parent versus a third party in child custody disputes when primary physical custody is at issue.

Court in that case, the reasoning in this case may cause some practitioners to raise an eyebrow. Because of both the grandmother and the father's actions, the trial court found that the grandmother stood in loco parentis to the child and had standing to bring her case.

However, the Superior Court found that the trial court committed two fatal flaws. First, it analyzed the custody factors under 23 Pa.C.S. Section 5328(a) in a blended fashion with mother and grandmother being grouped together. According to the Superior Court: "The trial court was required to weigh the merits of the father and grandmother's positions independently from that of the mother." Second, the Superior Court found that the trial court: "Undeniably ignored the presumption favoring the

father over the grandmother pursuant to Section 5327(b)."

Pursuant to the Child Custody Act, when there is a case concerning primary physical custody and the dispute is between a parent and a third-party, "there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence." According to the Superior Court, "in addition to ignoring the rebuttable presumption in favor of father, the trial court exacerbated that mistake by improperly saddling father with the burden of proof." Therefore, the Superior Court reversed the trial court's order and remanded the case for further proceedings.

This case is extremely important for the family law practitioner and the bench. It reiterates that there is a strong presumption in favor of a parent versus a third party in child custody disputes when primary physical custody is at issue. The mere fact that a party obtains standing through in loco parentis or solely under the grandparent factors, the party remains a third party and the presumption of custody remains for the parent, and the high hurdle of a clear and convincing evidence burden is on the third party to overcome. With regard to the issue of in loco parentis, it appears that with each case that gets decided by the Superior Court and reported, the target is ever moving. It is clear that there are three elements to be met in order to achieve in loco parentis standing: the assumption of parental status; the discharge of parental duties; and the consent and knowledge of the parent. However, the application of those three prongs is not necessarily precisely consistent. •